Case Nos. 18-2256 and 18-2520

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

St. Paul Park Refining Co., LLC d/b/a Western Refining

Petitioner/Cross-Respondent,

v.

National Labor Relations Board,

Respondent/Cross-Petitioner.

On Appeal from the National Labor Relations Board
Case Nos. 18-CA-187896 and 18-CA-192436

BRIEF AND ADDENDUM OF PETITIONER/CROSS-RESPONDENT ST. PAUL PARK REFINING CO., LLC D/B/A WESTERN REFINING

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SUMMARY OF THE CASE

St. Paul Park Refining Co. LLC ("SPPRC" or "Company") sent Rick Topor home and suspended him for ten days. It did so after an internal investigation concluded that Topor had refused to follow clear directions to work with supervisors to resolve issues about a work assignment, behaved insubordinately, violated policy, and was not candid during the investigation. The discipline issued to Topor was unrelated to any protected concerted activity.

The National Labor Relations Board ("Board") departed from precedent and reason to conclude that SPPRC violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act"). According to the Board, by raising an alleged safety concern in the morning, Topor relieved himself of further responsibility for his actions and could not be disciplined for insubordinate acts and policy violations he engaged in more than five hours later. The Board wrongly extended the protections of Section 8(a)(1), effectively granting employees who express alleged safety concerns carte blanche to disobey workplace policies and refuse job assignments rather than work constructively toward a solution.

Because the decision is based upon incorrectly applying law to factual findings unsupported by substantial evidence, the Company respectfully requests this Court reverse the Board's Decision and Order. The Company believes that oral argument is necessary and requests 20 minutes to present its case.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

Statutes

CORPORATE DISCLOSURE STATEMENT

St. Paul Park Refining Co. LLC d/b/a Western Refining is wholly owned by Northern Tier Energy LLC ("Northern Tier"). Northern Tier is wholly owned by Northern Tier Energy LP ("NTE LP"). Northern Tier Energy GP LLC is the sole general partner of NTE LP, and Western Refining Southwest, Inc. ("WRSW") is the sole limited partner of NTE LP. Giant Industries, Inc. ("Giant"), and its wholly-owned subsidiary Western Acquisition Holdings, LLC, are the sole shareholders of WRSW. Giant is owned by Western Refining, Inc., which is a wholly-owned subsidiary of Andeavor, a publicly-traded entity. No publicly held company owns more than 10% of Andeavor. Marathon Petroleum Corporation ("Marathon") and Andeavor have, however, signed a binding letter of intent under which Marathon will acquire all of Andeavor's outstanding shares.

JURISDICTIONAL STATEMENT

The Board exercised jurisdiction over the unfair labor practice proceedings underlying this appeal, Case Nos. 18-CA-187896 and 18-CA-192436, under Section 10(a) of the NLRA. 29 U.S.C. § 160(a). On May 8, 2018, the Board entered a final Decision and Order from which SPPRC appeals. SPPRC timely filed its Petition for Review on June 8, 2018. The Board filed a Cross-Application for Enforcement on July 16, 2018. This Court has jurisdiction over SPPRC's Petition for Review and the Board's Cross-Application for Enforcement under 29 U.S.C. §§ 160(e) and (f).

STATEMENT OF THE ISSUES

1. Whether the Board's decision erroneously concluded that SPPRC violated Section 8(a)(1) of the Act by issuing Topor a final written warning and ten day suspension for refusing to discuss workplace safety issues with his supervisors and for other workplace policy violations?

Apposite Authorities:

Nichols Aluminum, LLC v. N.L.R.B., 797 F.3d 548 (8th Cir. 2015);

Tschiggfrie Properties, Ltd. v. N.L.R.B., 896 F.3d 880 (8th Cir. 2018);

Sutter E. Bay Hosps. v. N.L.R.B., 687 F.3d 424, 434 (D.C. Cir. 2012);

Airborne Freight Corp. v. N.L.R.B. 728 F.2d 357, 358 (6th Cir. 1984).

2. Whether the Board abused its discretion by denying SPPRC's Motions to Reopen the Record as to both the MNOSHA letter and the arbitration award?

Apposite Authorities:

N.L.R.B. v. Miller Waste Mills, 315 F.3d 951, 955 (8th Cir. 2003);

Point Park Univ. v. N.L.R.B., 457 F.3d 42 (D.C. Cir. 2006);

Elec. Workers IBEW Local 46, 303 NLRB 48 (1991); and

United States Postal Serv. & Am. Postal Workers Union, Afl-Cio, 05-CA-119507, 2016 WL 4502618, at *1 (Aug. 26, 2016).

STATEMENT OF THE CASE

On November 4, 2016, SPPRC bargaining unit employee Richard "Rick" Topor refused to follow supervisory direction to discuss ways to improve the safety of a procedure he alleged was unsafe. Topor was sent home for the rest of the day. The Company Human Resources Department ("HR") promptly and thoroughly investigated the day's events. The investigation concluded that Topor refused to engage in discussions with his supervisors, pointed and shouted in a supervisor's face, refused a direct order from the same supervisor to return a company document, removed the document from Company premises in violation of policy, and was not candid during the investigation. The Company accordingly issued Topor a ten-day suspension and final written warning. Only Topor's clean disciplinary history led the Company to stop short of termination.

On November 9, 2016, Topor filed an unfair labor practice charge with the Board, alleging that his removal from the workplace during the investigation was retaliation for engaging in protected concerted activity.[1] The Office of the General Counsel pursued Topor's claims, filing a complaint and proceeding through a three-day hearing before Administrative Law Judge ("ALJ") Charles Muhl on July 12-14, 2017.

[1] Topor's charge was later amended and consolidated with a second charge, making similar allegations regarding post-investigation discipline. (JA 294-331).

On December 20, 2017, ALJ Muhl issued an opinion holding that SPPRC violated Section 8(a)(1) by suspending Topor and issuing him a final written warning. ALJ Muhl's decision was based on unjustified factual findings and a novel, legally unsound expansion of the concept of protected concerted activity disguised as applying Board precedent. Instead of fixing ALJ Muhl's errors, on May 8, 2018, the Board rejected SPPRC's Exceptions and adopted the entirety of ALJ Muhl's decision as its own.

ALJ Muhl and the Board both failed to appropriately consider credible probative evidence submitted by the Company, accepted patently incredible testimony, and permitted the General Counsel to enter prejudicial, non-probative preliminary findings from a state administrative agency, while rejecting SPPRC's offers of relevant *final* decisions from the same state agency and from a neutral arbitrator. The Board's decision was not supported by substantial evidence, reflects a misapplication of law, and must be reversed.

I. FACTS RELEVANT TO THE ISSUES ON REVIEW

SPPRC operates an oil refinery in St. Paul Park, Minnesota, which processes crude oil into products including gasoline, diesel fuel, asphalt, and kerosene. (JA 8-9).[2] Four crews work rotating twelve hour shifts to keep the Refinery operating 24 hours a day, seven days a week, and 365 days a year. (JA 46-47).

[2] SPPRC refers to the Joint Appendix as ("JA __").

A. SPPRC Policies Require Employees to Participate in Mitigating Safety Risks

Oil refining is a hazardous business, and SPPRC employees are required both to report unsafe conditions and to work with supervision to address their concerns. (JA 13, 239, 369, 405, 547-553). The SPPRC Employee Handbook requires employees "to immediately report any unsafe conditions to their supervisors . . . *and [to] assist in the correction of unsafe conditions as promptly as possible*," (JA 405) (emphasis added), while the Company's STOP Process[3] "gives any SPPRC employee or contractor the authority to stop a job" and discuss "potential risks *along with appropriate mitigation measures*." (JA 548) (emphasis added). The STOP Process mantra encapsulates the core of the SPPRC's safety philosophy: "[w]hen in doubt, we talk it out." (JA 553).

B. SPPRC Employees are Required to Adhere to Company Conduct Standards

SPPRC employees are required to conduct themselves in accordance with the Collective Bargaining Agreement ("CBA"), the Employee Handbook, and Company policies and work rules. (JA 333-377, 379-444, 635-636). Specifically prohibited conduct includes: "[u]nauthorized possession or removal of Company property, regardless of value;" "[i]nsubordination including, but not limited to,

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[3] SPPRC also has a "SLAM" policy, requiring that employees with safety concerns Stop, Look, Assess, and Mitigate. (JA 214).

refusal or failure to follow supervisory or management instructions or perform assigned work;" and "[d]ishonesty in the employer-employee relationship." (JA 635-636). SPPRC maintains the authority to discipline employees for violations of these standards. (JA 333-377, 379-444, 635-636).

C. Rick Topor's Employment

Rick Topor was hired by SPPRC in 2004. (JA 93). In 2008, Topor became the Vacancy Relief Operator ("VRO") on Crew 4 in the North Reformer unit of the refinery, where he remained through 2016. (JA 93).

As the VRO, Topor was the senior member of his crew, expected to train other operators, review procedures, and troubleshoot issues so the crew could achieve goals promptly. (JA 5, 379-444, 582-588, 616-618). Instead of taking the lead in overcoming obstacles, however, Topor frequently sought out problems to avoid work. (JA 15, 592, 617). Topor's penchant for slowing down work was sufficiently well-known that his fellow union members nicknamed him "Jake Brake" and "Roadblock." (JA 215, 226).

D. The Events of November 4, 2016

At 6:00 a.m. on Friday, November 4, 2016, Topor and the rest of Crew 4 returned to duty after a 72-hour break. (JA 47). When they left the refinery, the Penex unit, a key component of the North Reformer's operations, had been shut

down for maintenance. By the time they returned, preparations for restarting the unit were nearly complete. (JA 125-126, 199-200, 226).

1. The Penex Restart Process was Substantially Complete Before November 4, 2016

The Penex unit is a dry, closed system that uses a catalytic reaction to produce key gasoline components by boosting octane levels. (JA 125). When the unit is opened for maintenance, moisture is introduced, which must be removed before restarting the unit. (JA 199-200). A critical step in drying the unit involves injecting anhydrous hydrogen chloride (HCl) from compressed gas cylinders into the Penex. (JA 200). The HCl removes water and rust that otherwise causes costly damage. (JA 126, 129, 199-200).

Led by Reformer Day Foreman Corey Freymiller, HCl injections began in late October while Crew 4 was off duty. (JA 46, 227, 608-609). After the final full cylinder was injected, however, the Penex unit remained prohibitively moist. (JA 227, 608-609). Freymiller directed that the remaining contents of partially used cylinders be introduced into the system. (JA 228, 608).[4]

[4] When cylinders are full, the injection process is a simple matter of allowing the pressure differential between the high pressure cylinder and the low pressure Penex unit to direct the gas into the Penex. (JA 228). As the HCL cylinders begin to empty, however, the vapor pressure of the two vessels equalizes. (JA 228). The injection process naturally ceases while some HCl remains in the cylinders. (JA 228). To transfer the remaining HCL, an operator must recreate a pressure differential to allow gas to flow to the Penex. (JA 228).

2. New Safety Concerns Regarding the Penex Restart Were Raised on November 4, 2016, and Thoroughly Addressed

Around 7:30 a.m. on November 4, 2016, Field Operator Mike Rennert was assigned to inject the remaining HCl into the Penex, with an expected completion time of 9:00 a.m. (JA 44, 47, 611). Rennert, however, was unfamiliar with the task and, at 9:30 a.m., he called Shift Supervisor, Dale Caswell, and asked for a written procedure to empty the HCl cylinders into the Penex. (JA 44, 47). Caswell went to the area to assist. (JA 47). Simultaneously, Freymiller and Eric Rowe, the Unit Process Engineer responsible for the Penex unit, and the individual most knowledgeable about the injection process, arrived to check on the project's status. (JA 44, 140, 202, 207, 228). Upon learning of Rennert's concerns, Freymiller and Rowe discussed the process with Rennert and Caswell in detail. (JA 44, 200-201, 228-229). Freymiller and Rowe described and demonstrated how to create a pressure differential between the HCl cylinder and the Penex by indirectly heating the cylinder (thereby raising the cylinder's pressure to create a gradient) using a water bath. (JA 201, 228). Following the discussion, Rennert appeared confident that he could perform the task. (JA 611). Between 9:30 a.m. and 10:30 a.m., however, Topor became involved with the project and Rennert and Topor called a safety stop which halted progress.

a. The Unit Process Engineer Discussed Safety Concerns

At 10:30 a.m., Rowe returned to the Penex to check on the injection. (JA 201). Upon arrival, he encountered Rennert and Topor, who still had not begun the injection. (JA 201-202, 613). Rennert and Topor raised safety and process concerns to Rowe, and the three men discussed them. (JA 201-202, 613). Rowe answered questions, reviewed process documents and took notes. (JA 201, 204, 599, 613-614). The conversation lasted 30 to 60 minutes. (JA 203).

b. A New Procedural Step-Change was Drafted

After the extended conversation with Rennert and Topor, Rowe researched the remaining concerns and drafted a formal step-change to the Penex Startup Procedure (JA 458-499) specifically designed to address each concern. (JA 203, 595-596).

Rowe, Freymiller, and Operations Superintendent Briana Jung met around 1:30 p.m. to discuss and complete a final version. (JA 129-130, 203-204). As required by SPPRC policy, all three individuals signed off on the step-change. (JA 100-101, 544-545).

c. Two Knowledgeable Supervisors Reviewed the Step-Change Procedure with Topor

At 3:00 p.m., Jung brought the step-change to another Shift Supervisor, Gary Regenscheid,[5] who reviewed it. (JA 131). Regenscheid and Jung found Topor in the Reformer Satellite[6] and provided him with the step change. (JA 9, 93).

Topor reviewed the procedure and immediately raised questions. (JA 131). Jung answered his questions, but Topor was unsatisfied. (JA 131). Topor specifically complained about step 2(a), which required the separation of other HCl cylinders from the cylinder being heated. (JA 131). Topor insisted that the step required completely removing other partially-used cylinders of HCl from the Penex area using a forklift. (JA 110-111, 217). Jung, a degreed engineer who drafted the step, simply intended to ensure that no other cylinder was inadvertently heated but offered to consider Topor's suggestion. (JA 110-111, 130, 217).

Regenscheid went into the field to inspect the Penex. (JA 132, 217). Upon returning to the satellite, he suggested using an insulation blanket to separate the cylinder being heated from others within the cage. The insulation blanket eliminated the risk of inadvertent heating. (JA 132, 218, 583-589)

[5] Both Regenscheid and Caswell reported to Jung. (JA 43, 88).
[6] The Reformer Satellite is an indoor space that serves as a meeting place for crews in both the North and South Reformer. (JA 9).

d. Topor Refused to Discuss Mitigation and Pointed and Shouted in his Supervisor's Face

Rather than considering Regenscheid's suggestion, Topor announced that he was "calling a safety stop"[7] and would not do anything until the Safety Department came to review the situation. (JA 132, 583-588, 590-592). Notably, because Regenscheid thought the injection process would be underway soon, an Emergency Response Team member from the Safety Department, Tim Olson, was already in the area to assist with any necessary personal protective equipment—something within the purview of the Safety Department. (JA 132). Olson and the Safety Department were not, however, the appropriate subject matter experts to address the process concerns raised by Topor, and Olson did not get involved. (JA 127, 138, 149, 223).

When Regenscheid attempted to discuss possible mitigation with Topor a second time, Topor pointed in Regenscheid's face, and shouted "I'm calling a safety stop. I'm not doing this. I'm calling a safety stop." (JA 132-133, 146, 218, 583-588, 590).

[7] Topor's attempt to "call a safety stop" at this juncture was without effect because the Company's STOP Process had been in effect since Rennert and Topor first raised concerns between 9:30 and 10:30 a.m. (JA 91, 242).

e. Topor Was Sent Home After Again Refusing to Discuss His Concerns

Following Topor's outburst in the 3:00 p.m. meeting, Regenscheid and Jung left the Satellite to look at the Penex and discuss mitigation options. (JA 133-134, 583-588, 590-592). Jung agreed with Regenscheid's suggestion that an insulation blanket effectively accomplished the goals of step 2(a). (JA 134).

Regenscheid and Jung called Topor out of the Satellite to discuss this possible solution. (JA 134). Jung had to radio Topor twice before he responded and, even then, Topor refused to come to the field because he was filling out *optional* STOP Process paperwork. (JA 134, 583-588, 590-592). Regenscheid called Topor by radio and received the same response. (JA 134, 583-588, 590-592). Regenscheid called Topor again, directed him to come out immediately to discuss mitigation, and told him to fill out the optional paperwork later. (JA 134, 583-588, 590-592). Topor finally complied. (JA 134, 583-588, 590-592).

In the field, Jung attempted to show Topor what she and Regenscheid had been discussing. Topor initially had raised concerns about the cylinders' location and the proper interpretation of step 2(a), but when his supervisors attempted to address those concerns, Topor wholly refused to engage. (JA 134, 583-588, 590-592). Jung explained to Topor she and Regenscheid only wanted to have a conversation with Topor, but he again refused to participate. (JA 134, 583-588, 590-592). Ignoring the STOP/mitigation discussion process, Topor replied that he

was being pushed into something he did not want to do, that he was "calling a safety stop," and that he wanted the Safety Department to come down.[8] (JA 134). Regenscheid directly asked Topor whether he would discuss the mitigation option. (JA 591). Topor said he would not, and repeated he was "calling a safety stop," without further explanation. (JA 548-553, 583-588, 590-592).

Regenscheid directed Topor to return the newly-drafted step-change document. (JA 134-135, 219). Topor refused. (JA 135). Flouting Company work rules and his supervisor's instructions, Topor walked away with the step-change and took it home. (JA 23, 134-135, 583-588, 635-636).

f. The HCl Injection was Completed Without Incident

Several SPPRC managerial and technical employees spent from 9:30 a.m. to 4:00 p.m. on November 4, 2016, responding to safety concerns about the HCl injection process. By the time Topor was sent home around 4:00 p.m., insufficient time remained to complete the job. (JA 136, 216). A different crew used the process Topor refused to discuss to complete the HCl injection on the night shift, safely restarting the Penex. (JA 205-206).

[8] The Safety Department was not the proper entity to address Topor's concerns, which had already been addressed by the Technical Services Department. (JA 127, 138, 149, 223). None of the other operators testified that they would have called the Safety Department, which typically focuses on first aid, personal protection, and evacuation matters, not engineering issues. (*See* 127, 138).

3. Investigation, Findings, and Decision

Human Resources Director Tim Kerntz and Human Resources Generalist Christa Powers conducted a timely and thorough investigation of the November 4 events. (JA 247). Topor was placed on standard administrative leave during the investigation. (JA 245-246).[9]

Kerntz and Powers reviewed written statements from the five most directly involved individuals: Jung, Regenscheid, Caswell, Rowe, and Freymiller. (JA 590-592, 601-604, 606, 608-609, 611, 613-614). They also interviewed six individuals: Jung, Regenscheid, Caswell, Rowe, Olson, and Topor. (JA 247, 583-588).

Kerntz and Powers concluded that Topor had engaged in multiple insubordinate acts and policy violations, including refusing to participate in mitigation discussions, pointing his finger and shouting in his supervisor's face, and refusing to return—and taking home—the step-change document. (JA 583-588). Kerntz and Powers also determined that Topor made multiple misrepresentations during the investigation process. (JA 588).

[9] Topor's leave was later designated as unpaid only after it became a disciplinary suspension. Had Topor not been suspended, he would have been paid for all scheduled shifts. (JA 241, 246).

Kerntz and Powers sent their report to Operations Manager Michael Whatley.[10] (JA 583-588). The report summarized the evidence upon which their conclusions were based. (JA 583-588). After reviewing the report, considering Topor's largely positive work history, and discussing the matter with Kerntz and Refinery Manager Rick Hastings, Whatley converted Topor's administrative leave to an unpaid suspension, issued him a final written warning letter, and permitted him to return to work.

II. RELEVANT PROCEDURAL HISTORY

A. SPPRC Moved to Reopen the Record to Enter MNOSHA's Determination that the HCl Injection Process was Safe; ALJ Muhl Erroneously Denied the Motion

Over the objections of SPPRC, the ALJ admitted into evidence a letter from the Occupational Safety and Health division of the Minnesota Department of Labor and Industry ("MNOSHA"), *discrimination* section. The letter contained a so-called "merit finding" regarding allegations of discrimination/retaliation Topor had filed with that agency. (JA 105-106, 569). This "merit finding" was preliminary because all the information upon which it was based was received *without SPPRC's knowledge or participation*, and SPRPC could not present evidence or witnesses, hear or see the evidence collected, or submit any evidence. That letter

[10] Whatley was Jung's direct supervisor. (JA 125).

was not probative evidence, and its inclusion in the record is both prejudicial and unfair.

On September 29, 2017, after the hearing but well before ALJ Muhl issued his ULP decision, the *safety* division of MNOSHA, which responded to an anonymous safety complaint regarding the HCl injection process, informed SPPRC it would not be issuing safety citations. (JA 646). Unlike the "merit finding" by the discrimination division of MNOSHA, this final determination constitutes direct evidence that the HCl procedure was not, as Topor claimed, abnormally dangerous. On October 19, 2017, SPPRC brought a Motion to Reopen the Record to introduce this determination.

On December 20, 2017, the ALJ's decision issued. He found that SPPRC violated Section 8(a)(1) by disciplining Topor. (JA 658-694; ADD 1-37).[11] ALJ Muhl cited MNOSHA's preliminary "merit finding" as *persuasive evidence* of discrimination, and simultaneously denied SPPRC's Motion to receive MNOSHA's final determination that the HCl injection process did not violate safety standards. (JA 675-676; ADD 18-19).

B. Exceptions, Motion to Reopen the Record Following Arbitration Award, and Board Decision

SPPRC timely filed Exceptions to the ALJ's decision on January 17, 2018. (JA 695-704). On March 28, 2018, just days after final briefing on the Exceptions,

[11] SPPRC refers to its Addendum as ("ADD __").

SPPRC received an arbitration award denying Topor's grievance in an arbitration proceeding directly parallel to this matter. The arbitrator determined—based on nearly identical evidence—that Topor *did not* reasonably believe the HCl injection process was abnormally dangerous, that he insubordinately refused to engage in mitigation conversations, and that SPPRC had just cause to issue a final written warning and suspension. (JA 714-723). On April 16, 2017, SPPRC brought a Motion to Reopen the Record before the Board to introduce the award. (JA 705-227).

On May 8, 2018, the Board entered a final Decision and Order summarily affirming the ALJ's rulings, and denying SPPRC's Motion to Reopen the Record to enter the arbitration award. (JA 728-730; ADD 38-40).

SUMMARY OF THE ARGUMENT

The Board's conclusion that SPPRC violated Section 8(a)(1) of the Act when it issued Topor a final written warning and ten day suspension is based upon an incorrect application of law and is unsupported by substantial evidence.

Topor was *not* engaged in protected concerted activity when he refused to discuss mitigation of his safety concerns, and SPPRC did not act based on animus toward any alleged protected concerted activity when it disciplined Topor. The General Counsel failed to meet its ultimate burden of proving that "protected conduct was a substantial or motivating factor" in the decision to discipline Topor.

The General Counsel also failed to establish a *prima facie* case as required by *Wright Line*. The Board incorrectly found otherwise by conflating two separate courses of action by Topor and deeming them "inextricably intertwined." Topor raised safety concerns regarding the HCl injection process on the morning of November 4, 2016, and five hours later, he refused to engage with supervisors attempting to discuss the step-change created to address those concerns. By connecting Topor's involvement in raising safety concerns in the morning to his repeated refusal, hours later, to discuss his concerns, the Board incorrectly ruled that Topor engaged in protected concerted activity and that the Company's decision to send him home was direct evidence of animus.

This improper extension of the concept of protected concerted activity led the Board to find an 8(a)(1) violation where none existed. The Board's decision must be overturned, lest employees who raise a safety concern be free to refuse to discuss how to mitigate that concern and to engage in acts of insubordination, without repercussion, and regardless of whether any danger is actually associated with the assignment.

The Board also found animus based on its conclusion that the Company's investigation was inadequate. No substantial evidence supports such a conclusion. The Company thoroughly investigated the Topor incident, and that the ALJ might have done things differently does not make it otherwise, much less show evidence of animus.

Finally, SPPRC established that it would have taken the same disciplinary action regardless of the alleged protected activity, given its good faith belief Topor engaged in insubordinate behavior and repeatedly violated Company rules. Substantial evidence does not support the Board's decision to the contrary. Because SPPRC would have disciplined Topor in the same manner regardless of any allegedly protected activity, its actions did not violate Section 8(a)(1) and the Board's decision must be reversed.

The Board also incorrectly denied SPPRC's Motions to Reopen the Record as to both the MNOSHA letter and the arbitration award, and those decisions must be reversed.

First, the ALJ erroneously refused to reopen the record to accept the MNOSHA letter indicating that no safety citations would issue. This letter, considered in light of the highly prejudicial, preliminary MNOSHA letter the ALJ had erroneously allowed into evidence during the hearing, directly contradicted ALJ findings. The Board compounded the ALJ's error by adopting his decision with minimal analysis.

Second, the Board erred by refusing to reopen the record to accept the arbitration award, which became available only after exceptions were filed. That award was based on evidence nearly identical to that received by the ALJ and led to very different findings. The arbitrator held that: SPPRC had just cause to discipline Topor; Topor did not reasonably believe the HCl injection process was abnormally dangerous; Topor insubordinately refused to engage in mitigation conversations; and SPPRC had followed the CBA in issuing the discipline. The award found that Topor was not a credible witness on his own behalf, that he pointed and shouted at Regenscheid, and that he intentionally refused a direct order to return the step change document. That award bears significantly on the Board's decision-making and should have been considered. In fact, the consideration of the

MNOSHA discrimination letter, coupled with the rejection of the "no safety violation" letter and the arbitrator's award, caused severe prejudice to the Company and denied it the due process to which it was entitled.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

A federal appellate court should enforce a Board order only if the Board "has correctly applied the law and its factual findings [including the ALJ's credibility findings] are supported by substantial evidence on the record as a whole." *See* 29 U.S.C. § 160(e)-(f); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477–78 (1951); *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1507 (8th Cir. 1993); *Cintas Corp. v. NLRB*, 589 F.3d 905, 912 (8th Cir. 2009) (citing *N.L.R.B. v. Rockline Indus., Inc*., 412 F.3d 962, 966 (8th Cir. 2005)); *Town & Country Elec., Inc. v. N.L.R.B.*, 106 F.3d 816, 819 (8th Cir.1997). Enforcement is not presumed. *See, e.g.*, *Universal Camera Corp*., 340 U.S. at 490; *NLRB v. Brown*, 380 U.S. 278, 291 (1965) ("Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.").

The Court must examine the entire record and evaluate the Board's decision taking "into account whatever in the record fairly detracts from its weight." *Universal Camera* at 488. The Court is not bound by the Board's conclusions when those conclusions "go beyond what good sense permits." *Midwest Precision Heating & Cooling, Inc. v. N.L.R.B*., 408 F.3d 450, 457–58 (8th Cir. 2005) (citing *Local Union No. 948, IBEW v. N.L.R.B.*, 697 F.2d 113, 117–18 (6th Cir.1982)).

The Board may draw reasonable inferences from the evidence presented but "some substantial evidentiary basis must exist to support the inferences drawn." *Acme Prod., Inc. v. N. L. R. B.*, 389 F.2d 104, 106 (8th Cir. 1968) (stating the Board "has tended to overstretch" and find violations where substantial evidence does not exist). Inferences cannot be based "on suspicion, surmise, implications, or plainly incredible evidence." *Southern Bakeries LLC v. N.L.R.B.*, 871 F.3d 811, 820 (8th Cir. 2017) (citing *Nichols Aluminum,* 797 F.3d at 553).

A factual finding supported only by the uncorroborated testimony of an interested witness, particularly one who stands to profit from a back pay award, is not supported by "substantial evidence." *See Singer Co. v. N.L.R.B.*, 429 F.2d 172, 180 (8th Cir. 1970) (citing *NLRB v. Barberton Plastics Products, Inc.*, 354 F.2d 66, 69 (6th Cir. 1965); *NLRB v. Arkansas Grain Corp.*, 392 F.2d 161, 167 (8th Cir. 1968)). Similarly, factual findings made by consistently discrediting the witnesses for one party despite the lack of contradictory testimony suggest that the required "complete and fair consideration of all the evidence" did not occur. *N. L. R. B. v. Audio Indus., Inc.*, 313 F.2d 858, 864 (7th Cir. 1963).

II. THE BOARD ERRED BY FINDING THE COMPANY VIOLATED SECTION 8(A)(1)

A. The Board Erred by Finding the General Counsel Established a *Prima Facie* case under *Wright Line*

When the motivation for a disciplinary action is in dispute, unfair labor practice charges are evaluated under the *Wright Line* burden-shifting test. *Nichols Aluminum, LLC*, 797 F.3d at 554. Under *Wright Line*, the General Counsel had to prove that Topor's alleged "protected conduct was a substantial or motivating factor" in the decision to discipline him. *Id.* (citation omitted); *Kellwood Co., Ottenheimer Bros. Mfg. Div. v. N. L. R. B.*, 411 F.2d 493, 498 (8th Cir. 1969), opinion modified on denial of reh'g, (8th Cir. June 5, 1969) ("The burden of proving an improper motivation in making the [discipline] is upon the General Counsel.") To do so, the General Counsel had to establish a *prima facie* case by a preponderance of evidence, that (1) Topor engaged in protected concerted activity; (2) of which SPPRC was aware; (3) Topor suffered an adverse employment action; (4) SPPRC held animus towards the protected concerted activity; and (5) that, but for the protected concerted activity, Topor would not have been subject to the adverse action. *See e.g. N.L.R.B. v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013); *Rockline Indus.*, 412 F.3d 962 at 966; *In Re Am. Gardens Mgmt. Co.,* 338 NLRB 644, 645 (2002); *Nichols Aluminum*, 797 F.3d at 554 (simple animus is insufficient; the General Counsel must establish a "but for" relationship

between the protected activity and adverse action); *Tschiggfrie Properties, Ltd. v. N.L.R.B.*, 896 F.3d 880, 886 (8th Cir. 2018) (refusing to enforce a Board decision where the Board did not hold the General Counsel to its burden of proving discriminatory animus toward an employee's protected conduct was a substantial or motivating factor in the company's decision to discipline).

The General Counsel failed to meet its burden. The record does not support a finding that Topor engaged in protected concerted activity, that SPPRC harbored animus towards the alleged protected concerted activity, or that any alleged animus precipitated the disciplinary action.

1. Topor's Refusal to Discuss Mitigation was not Protected Concerted Activity

Topor did not engage in protected concerted activity when he repeatedly refused to discuss mitigation of a perceived safety risk with his supervisors.[12] The Board erred by finding otherwise, not only under a traditional theory of protected concerted activity, but also under the *Interboro/City Disposal Systems* line of cases, which recognize that an individual actor may engage in protected concerted

[12] The Board mistakenly viewed this case as involving discipline for a safety stop. In reality, this is about an employee disciplined for insubordinate behavior unrelated to the safety stop. Nobody else involved in the safety stop was disciplined, and the timing of the discipline occurred hours later and only after Topor adamantly refused to discuss mitigation options and behaved insubordinately.

activity when acting to enforce a collective bargaining agreement. *See NLRB v. City Disposal Systems Inc*., 465 U.S. 822 (1984).

a. Topor's Refusal to Engage in Discussion is not Protected Concerted Activity

Traditional protected concerted activity is defined as "activity engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *RELCO Locomotives, Inc.,* 734 F.3d 764 at 785 (citing *Meyers Industries* (Meyers I), 268 NLRB 493 (1984), remanded *sub nom*. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985)). It includes activity that "seeks to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries* (Meyers II), 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

Contrary to the weight of the evidence and the law, the Board found that Topor's refusals to discuss mitigation options constituted protected concerted activity because they were inextricably "intertwined" with his failure to complete a task he believed unsafe early that morning. The Board held that Topor's conduct that morning was protected and wrongly concluded that so were his refusals to engage in dialogue hours later. (JA 679; ADD 22).

To support the misguided determination that the two events cannot be separated, the Board relied upon *NLRB v. Thor Power Tool Co., 351 F.2d* 584 (7th

Cir. 1965), which states that individual actions cannot be considered "in a vacuum." *Id.* The facts in *Thor*, however, bear little resemblance to those here. *Thor* involved a union representative terminated on the spot when, *immediately after* a heated grievance meeting, he referred to a manager as a "horse's ass." The ALJ ruled the comment was protected. On review, the Board upheld the ALJ, reasoning that because the remark was made while leaving a heated grievance meeting, the comment was properly considered part of the meeting.

The Topor situation is not analogous. The evidence established that Topor's refusal to discuss mitigation was independent of his expression of a safety concern and, therefore, unprotected. Topor's refusals to discuss mitigation were not a single impulsive statement made in the heat of a protected dispute — they were a continued refusal to engage in dialogue after repeated directives and requests from supervisors over an extended period. The safety stop was a discrete act, fully accepted by management, and did not result in discipline for Topor or others. Five hours later, Topor's repeated refusal to discuss a possible remedy for another alleged safety concern was a separate and discrete act, not part of the original safety stop, and not protected concerted activity.

Topor's refusals to engage in conversation with his supervisors were not a protected refusal to engage in abnormally dangerous work and the cases that the Board cited to support its argument are inapposite. (*See* JA 679; ADD 22 (citing

In re Odyssey Capital Group, L.P., 337 NLRB NO. 174 (2002); *Burle Industries*, 300 NLRB 498 (1990); *Brown and Root, Inc.*, 246 NLRB 33, 36-37 (1979)).

Unlike Topor, the charging parties in *Odyssey*, *Burle*, and *Brown and Root*, were all faced with *directives* to complete work they specifically believed was unsafe. They were not asked to simply engage in the objectively safe task of discussing mitigation. That those employees' refusal to engage in work they believed dangerous was protected does not support the Board's conclusion that Topor's refusal to engage in a mere dialogue was also protected.

That Topor continually responded to his supervisors' attempts to engage him by saying he wanted a "safety stop" changes nothing. When Topor used this phrase a genuine safety stop had been under way for hours. The "stop" began when Topor and Rennert first raised concerns around 10:30 a.m., and no further work occurred. Regardless of whether the words "safety stop" were used, this was a "safety stop" under Company policy. When Topor repeated the term hours later, it was simply to refuse to engage in a conversation aimed at resolving his own alleged concern.

2. Topor's Refusal to Engage with His Supervisors Was Not Action to Enforce a Bargained Right

The Board erred by concluding that Topor's decision to refuse to discuss mitigation was also protected concerted activity under *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 4958 (2d. Cir. 1984) and *City*

Disposal Systems Inc., 465 U.S. 822. An employee who "makes complaints concerning safety matters *which are embodied in a contract*," is engaged in protected action "if the employee is *honestly and reasonably* invoking a contract right." *Kingsbury, Inc.*, 355 NLRB 1195 at 1204 (2010) (emphasis added).

To support its conclusion that Topor engaged in activity protected under the *Interboro* doctrine, the Board relied upon *Wheeling-Pittsburgh Steel Corp*, 277 NLRB 1388 (1985). In *Wheeling-Pittsburgh*, the Board ruled that workers who expressed safety concerns, and requested safety representatives to inspect the scene, could refuse to complete the allegedly unsafe work until a safety representative completed the inspection. (*See* JA 680-681).

This matter differs from *Wheeling-Pittsburgh* in multiple critical respects. The contract in *Wheeling-Pittsburgh specifically authorized employees to request a safety inspection* by a union safety representative. No such language exists in the SPPRC CBA. (*See* JA 333-377). Instead, the CBA requires employees to inform a company representative of safety issues, but it does not authorize the employees to refuse to engage with their supervisors until their chosen company representative arrives. *Id*. And nothing in *Wheeling-Pittsburgh* suggests that the employees—or Topor--had the right to refuse to join in a productive conversation about mitigation efforts while awaiting that inspection. Finally, an arbitrator held there was no contract violation – a finding the Board refused to consider.

Topor's refusal to engage in a mitigation discussion was neither traditional protected activity nor protected activity under *Interboro*. The Board erred in concluding otherwise by citing cases distinguishable in key respects, and then ignoring those critical differences. Topor was not, as the ALJ decision stated, "refus[ing] to perform an assigned task he believe posed an explosion risk." (JA 681; ADD 24). Absolutely no evidence suggests Topor was ever directed to inject HCl into the Penex unit following the safety stop. Rather, he adamantly refused to talk about possible ways to complete the task safely, and his refusals were discrete from the earlier and ongoing safety stop.

3. SPPRC Harbored No Animus Towards Topor's Safety Concerns

Topor was disciplined for his unacceptable behavior, not because of any alleged protected concerted activity. To prove that Topor's alleged protected activity motivated adverse employment action, the General Counsel had to prove employer animus toward the activity *and* a causal connection between that animus and the disciplinary decision. *See e.g. N.L.R.B. v. Transportation Management Corp*., 462 U.S. 393, 399-403 (1983); *Nichols Aluminum, LLC*, 797 F.3d at 554. Such animus is not lightly to be inferred. *CEC Chardon Electrical*, 302 NLRB 106, 107 (1991).

The Board mistakenly concluded that SPPRC harbored illegal animus toward Topor based on conclusions that (1) Jung and Regenscheid sent Topor

home on November 4, 2016, (2) the Company's investigation was "inadequate" and (3) the Company's claim that Topor was disciplined for pointing/shouting in his supervisor's face and for failing to return the step change document were pretextual. (JA 683-685; ADD 26-28).

a. SPPRC Encourages Employees to Express Safety Concerns

To find animus the Board ignored significant testimonial and documentary evidence, much of it uncontroverted, that established SPPRC has written policies which require employees to raise safety concerns, while also supporting such actions in practice. It was uncontroverted that SPPRC *rewards* employees for safety conscious work. (JA 106-107, 571, 573). Topor received such rewards both before and after the events at issue. *Id.* And uncontested evidence established that the Company has never disciplined employees for calling a safety stop. (*See* JA 28 (Rennert has never been disciplined for raising safety issues, including the Topor/Rennert stop at issue here), 37, 41-42 (Johnson was involved in multiple safety stops without discipline)).

b. SPPRC Management Reacted Appropriately to Topor and Rennert's Concerns

The undisputed testimony of Rowe, Jung, and Freymiller, establishes SPPRC took Rennert and Topor's concerns seriously, putting the HCl project on hold for an entire shift to address them. The Company engaged in a thoughtful

process of walking the employees through the procedure, considering their concerns, and ultimately drafting and approving a step-change to mitigate those concerns.

Tellingly, although others were involved in delaying the HCl injection, the record reflects that only Topor, the sole employee who behaved insubordinately, received disciplinary action. (*See e.g.* JA 24, 28; (Rennert received no discipline)). Topor himself was engaged in the safety stop process for many hours before he was sent home and an investigation initiated. It was only when Topor became insubordinate and refused to discuss mitigation options that he alone was dismissed for the day.

c. Sending Topor Home on November 4 is Not Evidence of Animus

The Board erred by concluding that, because Jung and Regenscheid sent Topor home on November 4, the Company harbored animus toward the protected concerted activity of refusing to work when conditions are perceived as unsafe.

The timing of events demonstrates it was Topor's insubordination, not safety concerns, that led to him being sent home. Topor first raised safety issues with Rennert around 10:30 a.m., but he (and not Rennert) was dismissed after refusing to discuss mitigation options late in the afternoon. Intervening events prevent drawing a causal inference between the morning discussions and the late afternoon action. *See Freeman v. Ace Tel. Ass'n.*, 467 F.3d 695, 698 (8th Cir. 2006) (holding

intervening events undermine any causal inference that a reasonable person might otherwise have drawn from temporal proximity). Topor unreasonably refused to participate in mitigation discussions required by the STOP Process and pointed his finger in Regenscheid's face. He was sent home because of those actions and *not* his morning expression of safety concerns.

d. The Company Conducted a Thorough and Fair Investigation That Is Not Evidence of Animus

The Board erroneously concluded that the Company's investigation was both "inadequate" and "strong" evidence of animus. That conclusion resulted from the Board's belief about what occurred, rather than a reasoned assessment of the evidence and the law.

An employer's investigation need not be perfect; it simply cannot be a sham. *See e.g. International Baking Corp*., 348 NLRB 1133, 1154-1155 (2006) (no animus inference where no evidence employer sought to distort inquiry or engage in sham fact gathering); *Brookshire Grocery*, 282 NLRB 1273 (1987) (cursory and ineffective investigation suggests unlawful motivation), enf. denied 837 F.2d 1336 (5th Cir. 1988). This is not a high bar. An employer need not interview "all possible witnesses to an incident" to avoid the conclusion that the investigation was a "sham." *See Bonanza Aluminum Corp.*, 300 NLRB 584, 590 (1990). An employer does not even need to interview the subject of the investigation for its effort to be considered "adequate." *Wal-Mart Stores, Inc. & United Food &*

Commercial Workers Int'l Union., 349 NLRB 1095, 1104 (2007). The Board cannot infer animus from an employer's failure to investigate in some preferred manner. *Amcast Automotive of Indiana*, 348 NLRB 836, 839 (2006); *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1158 (2004).

The Topor investigation, under governing precedent, was more than adequate. The proper standard is not what the Board would have done in 20/20 hindsight. SPPRC investigated the report of Topor's misconduct, first received from Jung, by taking written statements from five people and interviewing six, including Topor. The Board criticizes the decision not to interview other individuals, but Tim Kerntz, the Company's HR Director, was properly guided by the evidence he received. Jung's written statement identified additional individuals as present near where events happened, but she did not indicate, in writing or when interviewed, that any were actually involved in the incidents. Similarly, Regenscheid and Topor did not inform Kerntz they believed any bystanders—upon whose testimony the Board now relies—were involved or could serve as knowledgeable witnesses.

But because the Board credited and misapplied the testimony of Topor's fellow union members Rennert, Johnson, and Morales, it asserts that the Company's failure to interview them rendered the investigation "inadequate." The Board's decision to assess the adequacy of the Company's actions based on its

after-the-fact opinion of "truth" is not proper. The explanation for Kerntz's decision not to interview additional witnesses is clear and reasonable. He spoke to all three individuals actually present and involved in the critical events. Two (Jung and Regenscheid) provided consistent accounts of what occurred. Kerntz had no reason to believe that uninvolved partial bystanders could provide accounts of conversations, to which they were not party, that would alter his conclusions.

SPPRC thoroughly investigated the event and allowed Topor to tell his version of events. That SPPRC reached a different conclusion from the Board on the facts is not evidence of sham or animus.

4. No Substantial Evidence Supports a Finding that the Company's Stated Beliefs About Topor 's Conduct Were Pretextual

Topor was insubordinate on November 4, not only when he refused to discuss Regenscheid's suggestion, but also when he shouted and pointed in his Regenscheid's face, ignored instructions, and took home the step-change document. The Board, however, found these events did not occur and, instead of assessing whether the decision-maker reasonably believed that they did, deemed the Company's reliance on them evidence of pretext and animus. The Board's findings are not supported by substantial evidence and must be reversed.

The Board's factual findings are based almost entirely on Topor's hearing testimony. The Board credited Topor's testimony because, inexplicably, the ALJ

found Topor to be "thorough and detailed in his account" and his testimony was deemed consistent and his demeanor confident "even when challenged extensively during cross-examination." (JA 664-665, 672; ADD 7-8, 15).[13] The Board simultaneously discredited the far more reliable testimony of Jung and Regenscheid, based primarily on insignificant differences between their otherwise remarkably consistent accounts. (JA 672; ADD 15). Those variations, however, related to inconsequential details and were the natural result of eight months passing between the events and hearing. They should not be used to discredit otherwise consistent testimony.[14] *See Tri-City Meats*, 231 NLRB 768, 774 (1977) (witnesses cannot be expected to testify without "unconscious and unintentional mistakes" and may give different accounts of the same factual situation without lying). When multiple witnesses testify perfectly consistently with one another, they may be deemed less reliable because identical testimony may suggest

[13] In this respect, Topor received an obvious benefit despite having no corroborating witnesses. By contrast, Arbitrator Knudson made the exact opposite finding in the parallel arbitration proceeding, calling into question the credibility determinations of the Board. The Arbitrator found: 1) it was possible Topor did raise his voice and point his finger at Regenscheid; 2) Topor was insubordinate in his refusal to discuss mitigation of his safety concerns; and 3) "Topor's failure to comply with Regenscheid's request to return the [step-change] paperwork was intentional." (JA 714-723)

[14] Contemporaneous documentation ignored by the Board also verifies the Company's version of events. (*See e.g.* JA 594-597, 599, 601-604, 606, 608-609, 611, 613-614).

fabrication and rehearsal among witnesses. *See Nissen Foods (USA) Co.*, 272 NLRB 371, 386 (1984).

Regenscheid's account was also discredited based on his admitted "lack of full recall," his "rapid, abbreviated" responses to questions, and his demeanor, which the Board described as "hesitant" in contrast to Topor. (JA 672; ADD 15). These are not persuasive reasons for discrediting the testimony of a witness likely nervous about testifying at a formal hearing. *See, e.g.*, *T-W. Sales & Serv., Inc.*, 346 NLRB 118, 126 (2005) (crediting a witness despite nervousness while testifying); *State Cty. Employees Afscme Dist. Council 47*, 277 NLRB 1088, 1090 (1985) (a witness's nervousness does not necessarily affect their credibility). Regenscheid's documentation from the day of the incident follows his oral testimony and was not fairly considered by the Board. (JA 603).

Even less persuasive reasoning was given for rejecting Jung's testimony. Aside from minor inconsistencies between her testimony and that of Regenscheid, the ALJ, providing no examples and contradicted by the transcript, generalized that her testimony was "elicited with many leading questions and she frequently hedged her responses with qualifiers" and was unworthy of belief. (JA 672; ADD 15). The ALJ also improperly drew an unspecified adverse inference against Jung because she forgot at hearing why she highlighted a document in a particular manner, while ignoring Topor's complete failure to remember what occurred

during his investigation interview. (JA 672; *See infra*). In contrast to the apparently strict standards applied to the testimony and memories of Jung and Regenscheid, Topor's "occasional[]" non-responsiveness and frequent claims not to remember key incidents were wholly disregarded. (JA 672; ADD 15).

A simple review of the transcript demonstrates that Jung and Regenscheid provided specific and direct responses to open-ended questions whereas Topor was consistently evasive, nonresponsive, and unable to deny cross-examination questions:

Jung

Question (by counsel for SPPRC): What happened next?

Jung: . . . And Gary [Regenscheid] came back in at that point and stood up against those computers and said, "Rick [Topor], we can put an insulation blanket in between the two cylinders to isolate them away from the cylinder that's going to be heated in the water bath." And Rick said, "I'm calling a safety stop. I'm calling a safety stop." And Gary then, louder, said, "Rick we can put an insulation blanket in between the cylinders that are in the cage to separate them from the one that's being heated." And Rick stood up, turned around to Gary, and loudly pointed at him and said, "I'm calling a safety stop. . ."

(JA 132).

Question: You said "pointed." Can you please describe what you mean by use of the word "pointed"?

Jung: He put his finger in Gary's face.

Question: How close to Mr. Regenscheid's face did his finger become?

Jung: I would say 6 inches.

(JA 133).

Question: What happens next?

Jung: So Gary said, "Rick, you can go home." And Rick kind of turned and walked away. He had the procedure step change in his hand. And Gary said, "Rick, please give that back to me." And Rick said, "No." And he walked away.

(JA 134-135).

Regenscheid

Question (by counsel for SPPRC): And what did you do when you entered the satellite?

Regenscheid: I walked up and Rick was sitting at the computer, and I said "Rick, come on, let's go, I have a way to mitigate the situation."

Question: And was Ms. Jung present?

Regenscheid: Yes.

Question: And what did Mr. Topor say in response?

Regenscheid: He jumped up, pointed his finger at me, and says, "Gary, you don't understand, I need to fill out the stop paperwork."

Question: How close was his finger to your face or body?

Regenscheid: I believe – I don't know a foot, two foot.

(JA 218).

Question: What happened next?

Regenscheid: I also asked – he was holding the copy of the step change in his hand, and I said, "give me the step change, so I can put it in the procedure book."

Question: Did you make any gestures as you made that statement?

Regenscheid: I held my hand out to grab it. He folded it back and said, "No" and then proceeded to head toward the satellite.

Question: Did Mr. Topor say or do anything that indicated that he had not heard your request for the return of the step change paperwork?

Regenscheid: No. I mean he pulled it back away, so I knew he heard my request.

Question: Did he verbally answer you?

Regenscheid: Yes, he said, "No."

(JA 219).

Topor

Question (by counsel for SPPRC): Ms. Jung was present and within hearing distance and engaged at the time you were talking to Mr. Regenscheid about ways to mitigate the situation?

Topor: I think she was in the area. I don't know if she was engaged or not, but she was in the area.

(JA 111).

Question: Ms. Jung was standing right next to Mr. Regenscheid when you were having this discussion, right?

Topor: Where was this at?

Question: When you were having the discussion with Mr. Regenscheid about tying off the cylinders and using the insulation blanket.

Topor: What location was this at?

Question: Well, did you talk inside, outside, or both?

Topor: That's what I'm asking you.

(JA 112).

Question: Do you recall Mr. Regenscheid and Ms. Jung looking at you as you were about to leave the plant and Mr. Regenscheid asking you to please return the step change form?

Topor: I don't recall that.

Question: Do you recall looking at both of them and saying "No?"

Topor: I don't recall that.

Question: Do you recall Mr. Regenscheid having his hand out reaching for the form toward you?

Topor: I don't recall that.

Question: Do you recall taking the document that had been in your hand and then shoving it in your pocket

Topor: I don't recall.

(JA 114-115).

Question: If I understood your testimony correctly, at the time of the incident, you walked away from Ms. Jung and Mr. Regenscheid because you were concerned about escalation. Is that right?

Topor: No. I was sent home for the day and asked to leave the property.

Question: But you explained, I believe, Mr. Topor, and correct me if I'm wrong, that you felt you couldn't hear what Mr. Regenscheid was saying to you because you were walking away at the time things had become heated and you didn't want it to get worse.

Topor: I was already sent home at the time. I was far enough away. Did not want – I didn't want any more problems. I wanted to go home because it was

not going – I didn't believe anything was going to get resolved. And I was sent home.

(JA 115).

Question: But when you were interviewed by Mr. Kerntz on November 8th, you denied that you in fact had been called by Mr. Regenscheid on the radio, right?

Topor: I don't recall.

Question: Did Mr. Kerntz ask you whether Gary or Brianna [Jung] told you they wanted to discuss ways to mitigate the situation?

Topor: I don't recall.

Question: Do you recall telling Mr. Kerntz that they never said that they were upset and Gary can bully people and didn't care about your safety?

Topor: I don't recall. I mean, it's been 9 months.

Question: Did Mr. Kertnz ask you whether you had any discussion with them at all, and you replied "No"?

Topor: I don't recall.

Question: Did Mr. Kertnz ask you if Mr. Regenscheid had asked for the procedure before you left?

Topor: You know, I don't recall.

Question: Do you recall telling him he didn't?

Topor: You know, I don't recall.

(JA 120).

To avoid the conclusion that Topor pointed in Regenscheid's face, the Board disregarded the clear, consistent testimony and documentation of two supervisors and relied primarily on Topor's self-serving and recollection-challenged testimony. Topor's self-serving testimony cannot, alone, constitute substantial evidence to support the Board's findings he did not point and shout at Regenscheid or refuse to return the step change. *See Singer Co. v. N.L.R.B.*, 429 F.2d 172, 180 (8th Cir. 1970) (a factual finding only supported by uncorroborated testimony from an interested witness is not supported by substantial evidence).

In sum, the Board credited Topor's almost constant "I don't recall(s)" instead of the detailed, consistent testimony of Jung and Regenscheid.

5. Topor's Self-Serving Denial was Erroneously Credited based on Testimony Improperly Deemed Corroborating

The Board insists that it was not merely relying on Topor's self-serving lack of recollection to find he did not point and shout at Regenscheid, by characterizing the testimony of Joshua Johnson and Duke Morales as corroborating. (JA 672; ADD 15).

However, the testimony of Johnson and Morales does not corroborate Topor's account. Johnson and Morales each testified that neither was party to the conversation among Topor, Jung and Regenscheid, neither heard or saw the entire event, neither could say for certain whether the pointing and shouting occurred.

(JA 40 (Johnson: he forgot how many radio calls were and that "anything is possible"), JA 81 (Morales: he left when there was too much "commotion," JA 85 (Morales: he was focused on his job and not the events between Regenscheid, Topor, and Jung)). And Morales, contrary to the Board's speculation he was likely present when the finger pointing occurred, specifically stated he left when he no longer wanted to hear any more "commotion", presumably during or before the most heated part of the conversation when—common sense dictates—the pointing occurred. (JA 672; ADD 15; JA 81). The conclusion that the pointing incident described in detail by Jung and Regenscheid did not occur simply because Johnson and Morales did not see it is highly flawed.

Unlike Morales and Johnson, both Jung and Regenscheid were engaged for the entire conversation and both testified that they witnessed Topor point his finger in Regenscheid's face. (JA 132-133, 146; 582-588, 590-592). Their testimony regarding Topor's actions was consistent with the accounts they gave HR during the investigation.

To attempt to justify the decision to credit Topor's denial, the Board argued neither Jung nor Regenscheid specifically mentioned the finger-pointing in their written original reports on the day of the event. (JA 672; ADD 15). This is hardly the damning evidence the Board implies. Upon realizing her omission, Jung promptly revised her brief statement to describe this conduct on her *next work day*.

Jung gave consistent accounts about the incident during her investigatory interview and at the hearing, which were corroborated by the accounts given by Regenscheid in both venues. Jung also credibly testified that she informed Michael Whatley about Topor's behavior towards Regenscheid on the day of the incident. (JA 135). Whatley confirmed that Jung told him about Topor's disrespectful behavior towards Regenscheid on November 4 (JA 239). The Board, however, entirely failed to consider his testimony, a curious decision as Whatley was the ultimate decision-maker on Topor's discipline. (JA 241).

The Board chose, without explanation, to ignore and reject numerous pieces of consistent evidence that Jung and Regenscheid witnessed Topor point in Regenscheid's face. The self-serving testimony of Topor and the allegedly corroborating testimony of witnesses not directly involved cannot meet the substantial evidence standard, particularly when faced with consistent testimony from other involved witnesses. Viewed objectively, the evidence supports a finding that Topor pointed in Regenscheid's face, that the Company legitimately found that Topor did so, and that the behavior was part of the reason Topor was sent home and ultimately disciplined. No evidence suggests the Company's explanation was pretextual or that it acted with illegal animus.

6. Topor's Self-Serving Denial that He Refused to Return the Step-Change was Erroneously Credited

The Board also wrongly found that Topor did not refuse Regenscheid's direct request to return the step change. (JA 673; ADD 16). The Board rejected what were admittedly consistent accounts from Jung and Regenscheid, both of whom were present and involved. Instead, the Board favored Topor's self-interested testimony he did not "recall" hearing Regenscheid ask him to return the document. And, although the Board found that Topor took the step-change document home with him, it refused to acknowledge that doing so violated Company rules warranting a disciplinary response. (JA 669; ADD 12). The Board ignored conclusive evidence that a work rule prohibits the removal of Company property, regardless of value, and found Topor blameless for failing to return the step-change before leaving the facility.

The Board based its findings regarding the step-change document on Rennert's speculation that, although he heard Regenscheid make the request of Topor, it was loud and Topor likely did not hear. (JA 673; ADD 16). The Board deemed Rennert's speculation credible and important because of his "confident" and "reliable demeanor," yet failed to address the confused, contradictory and speculative nature of Rennert's testimony on this point, or Topor's lack of recall.

A review of the record, however, indicates that Rennert's testimony is far from reliable and cannot be credited given its internal inconsistency and

speculative content. His testimony about what he heard simply does not make sense. First, Rennert testified that he was wearing headphones to keep his ears warm, and was listening to the radio feed on those headphones, which allowed him to hear the radio calls between Topor, Regenscheid, and Jung. (JA 22). Second, he testified that, notwithstanding his headphones, he also heard the separate conversation between Topor, Jung, and Regenscheid that occurred in the field, not over the radio. (JA 22-23). Third, he testified there was a lot of noise outside at the Penex and that, although he could hear Regenscheid ask Topor for the step change back, he did not believe Topor could have heard Regenscheid. (JA 23). This account does not fit together and the Board's assessment of Rennert's speculation as reliable is hopelessly flawed. Further detracting from the Board's assessment is the reality that one individual cannot testify reliably to what another individual heard, particularly if the two were not listening from the same location.

In contrast to Rennert's unreliable assertion that, despite the "loud" ambient noise and his headphones, he heard nearly everything as a mere bystander, Jung and Regenscheid both actually participated in the conversation and testified consistently about Topor's refusal to return the step change. Their contemporaneous, repeated reports outweigh Topor's vague denial and Rennert's speculative testimony.

The Board's findings regarding what occurred are plainly unsupported by substantial evidence. Regardless, it is not what actually happened but what the Company *reasonably believed* had happened that matters. *Sutter E. Bay Hosps. v. N.L.R.B.*, 687 F.3d 424, 434 (D.C. Cir. 2012). Under the governing standard, the General Counsel had to prove that the Company acted with the *intent* and *motive* to halt a protected activity. A Board finding that Topor did not hear the request does not meet this standard. As long as the Company reasonably believed that Topor was deliberately refusing to obey a directive, its actions taken in response are not pretextual or indicators of animus. *Id.*

The Company was entitled to rely on the consistent accounts given by Regenscheid and Jung. Doing so, the Company reasonably interpreted Topor's behavior as insubordination. Topor also admitted that he took the step-change home, and uncontroverted evidence established that removal of Company property from the premises is prohibited by the Company work rules. (JA 244-245, 635-636).

The overwhelming evidence proves Topor refused Regenscheid's directive to return the step-change and violated the work rule prohibiting employees from removing Company property without permission. The Company's lawful actions toward Topor resulted directly from his improper behavior—or, at the very least,

the Company's good faith believe about his behavior—and not animus toward protected activity.

B. The Company Would Have Disciplined Topor in the Same Manner Absent the Alleged Protected Activity

The General Counsel's failure to carry its burden relieves SPPRC of any duty to demonstrate it would have disciplined Topor absent protected activity. The evidence, however, plainly establishes that SPPRC would have taken the same action notwithstanding the alleged protected conduct. *See N.L.R.B. v. La-Z-Boy Midwest, a Div. of La-Z-Boy Inc.*, 390 F.3d 1054, 1057 (8th Cir. 2004); *Nichols Aluminum, LLC*, 797 F.3d at 554 ("If, and only if, the General Counsel meets [its] burden, the burden shifts to the employer to exonerate itself by showing that it would have taken the same action for a legitimate, nondiscriminatory reason regardless of the employee's protected activity.") (citations omitted).

"In order for an employer to meet its *Wright Line* burden, it does not need to prove that the employee actually committed the alleged offense, but must, however, show that it had a reasonable belief that the employee committed the offense, and that the employer acted on that belief in taking the adverse employment action against the employee." *Midnight Rose Hotel & Casino, Inc.*, 343 NLRB 1003, 1005 (2004); *see also Sutter E. Bay Hosps.*, 687 F.3d at 434 ("An employer who holds a good-faith belief that an employee engaged in the misconduct in question has met its burden under *Wright Line*. This is true even if

the employer is ultimately mistaken about whether the employee engaged in the misconduct. The good-faith belief demonstrates that the employer would have acted the same even absent the unlawful motive.") (citation omitted); *Yuker Construction*, 335 NLRB 1072 (2001) (discharge based on mistaken belief is not unfair labor practice, so long as it is not for protected activity); *GHR Energy*, 294 NLRB 1011, 1012-1014 (1989) (employer met *Wright Line* rebuttal burden by showing employer reasonably believed employees had engaged in serious misconduct).

The Board reasoned that the Company would not have disciplined Topor but for what the Board regarded as "protected concerted activity." The Board drew an adverse inference from the absence of evidence regarding other employees who engaged in similar misconduct and their associated discipline.[15] (JA 686; ADD 29 (because "[t]he [Company] possesses all of that information and could have presented it," it must infer that "such evidence would not have shown the [Company] treated Topor similarly to other employees in the past"). In short, the Company was required to prove the negative. But, it was not the Company's burden to produce such evidence and the Board was not empowered to draw such an adverse inference. A lack of evidence is not persuasive when, as here "the

[15] Notably, no evidence in the record indicates that any other SPPRC employee has ever engaged in behavior similar to Topor. The Board's criticism for not presenting evidence regarding how such phantom employees were treated is illogical.

record does not show that any other employees violated those policies under comparable circumstances." *Midwest Terminals of Toledo Int'l, Inc. & Int'l Longshoremens Ass'n, Local 1982, AFL-CIO & Don Russell*, 365 NLRB No. 138 (Oct. 11, 2017); *E.g., Armstrong Mach. Co., Inc. & United Food & Commercial Workers Union, Local 6, AFL-CIO, Clc*, 343 NLRB 1149, 1177 (2004) (a successful *Wright Line* defense does not depend on proof that another employee committed the same offense and received the same discipline; evidence "detailed enough to show how much the offending conduct transgressed its own standards," or those of the industry, can suffice.) *Armstrong*, 343 NLRB at 1177.

SPPRC completed a thorough and fair investigation. The Company reasonably concluded that Topor was insubordinate and lied during the investigation. SPPRC issued Topor a final written warning and ten day suspension based on this reasonable belief. The hearing testimony established that Topor was disciplined not for what he alleges was protected activity—i.e., a calling a safety stop in the morning—but based on SPPRC's reasonable belief he engaged, hours later, in insubordinate behavior and violated Company rules. Topor would have faced the same disciplinary action for this conduct regardless of whether by "calling a safety stop" he engaged in protected activity.

After investigation, SPPRC reasonably believed Topor engaged in multiple acts which, on their own, supported discharge. Every Company official involved

in the discipline testified Topor's behavior violated numerous policies and the same disciplinary action—or something more severe—would have issued regardless of Topor's alleged protected concerted activity. (JA 138, 140, 149, 220, 242). Such testimony rebuts any inference of discrimination. *See, e.g.*, *G & H Prod., Inc. v. N.L.R.B.*, 714 F.2d 1397, 1402 (7th Cir. 1983) (supervisor testimony demonstrated that employer would have terminated three employees for poor work performance regardless of alleged protected activity); *Airborne Freight Corp. v. N.L.R.B.*, 728 F.2d 357, 358 (6th Cir. 1984) (Board incorrectly relied on ALJ's subjective assessments about what disciplinary actions an employer should have taken where employer believed in good faith that an employee falsified timecards and would have been terminated absent alleged protected activity).

III. THE BOARD ERRED BY DENYING THE COMPANY'S MOTION TO REOPEN THE RECORD

A. Legal Standard

Board decisions related to motions to reopen the record are reviewed on an abuse of discretion standard. *N.L.R.B. v. Miller Waste Mills*, 315 F.3d 951, 955 (8th Cir. 2003). An abuse of discretion occurs where the Board's "findings of fact are not supported by substantial evidence in the record considered as a whole." *Point Park Univ. v. N.L.R.B.*, 457 F.3d 42, 51–52 (D.C. Cir. 2006) (citation omitted). A Board decision refusing to reopen the record that does not "tak[e] into

account contradictory evidence or evidence from which conflicting inferences [can] be drawn [is] not supported by substantial evidence." *Id.*

When analyzing whether to grant a motion to reopen the record, reflection on evidence admitted is critical to a just decision, particularly when considering decisions issued by other governmental entities. *See, e.g., D.H. Martin Petroleum Co.*, 280 NLRB No. 58, *1 n.1 (1986) (affirming ALJ decision to grant a motion to reopen the record to admit appellate court's decision on unemployment appeal, issued after the close of the ULP hearing, because evidence regarding the original unemployment proceeding was allowed).

1. ALJ Authority to Reopen

Section 102.35(a)(8) of the Board's Rules and Regulations authorizes an ALJ to reopen the record, after the close of hearing and before issuing a decision, and Section 102.35(a)(11) allows the entry of new evidence into the reopened record.

The Board's Rules and Regulations do not require an ALJ to consider any specific factors when ruling on a motion to reopen. Based on the evidence in a particular case, a judge may use his discretion to decide whether to reopen the record to admit new evidence. *See Elec. Workers IBEW Local 46*, 303 NLRB 48, 57 (1991) (affirming the ALJ's decision, stating that "Section 102.48 (d)(1) dealing with the reopening of the record after the Board decision or order," does not apply

to a motion to reopen the record brought before an ALJ issues a decision; because Section 102.35 does not include specific standards or guidelines for motions "a decision on such motion is committed to the sound discretion of the administrative law judge.").

2. Board Authority to Reopen

Sections 102.48(b)(2) and (c)(1) of the Board's Rules and Regulations authorize the Board to reopen the record and receive further evidence after exceptions to an ALJ decision. Such evidence must fall into one of three categories: newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence that the Board believes may have been taken at the hearing. And the evidence must be such that, if credited, it will affect the outcome of the case. NLRB Rules and Regulations, Section 102.48(c)(1); *see e.g.*, *Edwards Painting, Inc. & Int'l Union of Painters & Allied Trades, Dist. Council 5*, 19-CA-116399 and 19-2017 WL 2570044, at *1 (June 12, 2017); *Grinnell Fire Protection Systems*, 307 NLRB 1452, 1452 n. 2 (1992).

Often, the Board wrongly equates "newly discovered evidence" and "evidence which has become available only since the close of the hearing" with one another, inexplicably holding that both require the Board to reject evidence brought forward after the hearing if it did not exist prior to the hearing. *See, e.g. United States Postal Serv. & Am. Postal Workers Union, Afl-Cio*, 05-CA-119507,

2016 WL 4502618, at *1 (Aug. 26, 2016). By doing so, the Board improperly ignores the canons of interpretation to which it otherwise adheres. *See e.g.*, *Oakwood Health-care, Inc.*, 348 NLRB 686, 688 fn. 21 (2006) (citing statutory canon against construction that makes part of statute superfluous or redundant); *see also id.* at *1 n.3 (Miscimarra, dissenting) (stating that a motion to reopen the record need not relate to evidence that could have been presented at the original hearing, because Sec. 102.48(d) of the Board's Rules and Regulations expressly permits a motion to reopen the record based on "evidence which has become available only since the close of the hearing" and that such language must have a different meaning than "newly discovered").

Contrary to some Board precedent that formerly required proffered evidence to have existed before the hearing, the Rules themselves now specifically contemplate the introduction of "[e]vidence which has become available only since the close of the hearing." This phrase must be interpreted to include evidence regarding post-hearing events, lest it be stripped of any meaning different from "newly discovered," rendering it wholly superfluous and redundant. *See e.g.*, *Oakwood Health-care, Inc.*, 348 NLRB at 688 fn. 21 (2006) (deeming incorrect statutory interpretation that results in language being rendered superfluous and redundant); *see also Wayron, LLC & Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers of Am., Local 104,* 19-CA-032983, 2017

WL 971620, at *2 (Jan. 23, 2017) (Miscimarra, dissenting); *Edwards Painting, Inc. & Int'l Union of Painters & Allied Trades, Dist. Council 5*, 19-CA-116399 and 19-CA-122730, 2017 WL 2570044, at *2, n. 3 (June 12, 2017) (Miscimarra, dissenting).

B. The ALJ and Board Erred by Denying the Company's Motion to Reopen the Record To Include the MNOSHA Safety Letter after Wrongly Allowing The General Counsel to Introduce the Preliminary MNOSHA Discrimination Letter

During the hearing, over the objections of counsel, the ALJ admitted into evidence a letter from MNOSHA containing a *preliminary* decision to allow Topor to move forward with a separate discrimination complaint he filed against SPPRC with that agency. (JA 105-106, 569).

On September 29, 2017, after the hearing but well before the ALJ issued his decision, MNOSHA's safety division determined that no citations would result from the safety complaint it received regarding the HCl injection process. (JA 646). On October 19, 2017, SPPRC brought a Motion to Reopen the Record to introduce the MNOSHA safety determination. Ultimately, both the ALJ and the Board denied the Motion. These decisions were an abuse of discretion and based on an incorrect application of law, not supported by substantial evidence, and go well beyond what good sense permits. They should be reversed.

The MNOSHA letter containing the agency's *final* determination that the HCl injection process complied with safety regulations was relevant and properly

admissible on a motion to reopen the record. The letter was not available during the initial hearing, but it would almost certainly have been admitted if it had, because of the significant disagreement between the parties regarding the safety of the task, the ALJ's stated belief that the safety of the task was a critical question, and the ALJ's previous decision to accept a letter containing a *preliminary* finding, issued by a different part of MNOSHA, into the record.

Throughout the hearing, the General Counsel attempted to establish that the HCl injection process was highly dangerous and, in post-hearing briefing, used the confidence displayed by the Company's witnesses regarding the safety of the task to argue they did not care about safety and disregarded Topor's allegedly reasonable concerns. (*See General Counsel's Post-Hearing Brief* at 14-15, 19, 21). Such confidence was validated by the conclusion of MNOSHA's safety investigation and that agency's decision is relevant and potentially important to the ALJ's ruling, particularly as it supports Company witnesses.

And when the ALJ admitted the preliminary discrimination letter from MNOSHA over counsel's objections, he stated that it was being admitted into evidence because "this whole case is about whether there was a safety issue – at least in part, whether there was a safety issue on November 4th." (JA 106). Given that the ALJ stated the case was dependent upon the question of "whether there was a safety issue," the finding from the investigation conducted by the *safety* unit

of MNOSHA—resulting in no citations being issued—was relevant to a decision and should have been admitted into the record.

C. The Board Erred By Denying the Company's Motion to Reopen the Record to Include the Arbitration Award, and to Defer

On March 28, 2018, just days following final briefing on the Exceptions, an arbitration award issued denying Topor's grievance in a proceeding parallel to this matter. The arbitrator determined—based on evidence nearly identical to that received by the ALJ—that SPPRC had just cause to discipline Topor based on his insubordinate refusal to engage in mitigation conversations with his supervisors, and that SPPRC followed the CBA in issuing a final written warning and suspension. (JA 714-723). The Award found that Topor was not a credible witness on his own behalf.

On April 16, 2018, SPPRC brought a Motion to Reopen the Record before the Board to introduce the highly relevant arbitration award. (JA 705-227). On May 8, 2018, the Board entered a final Decision and Order, which erroneously denied SPPRC's Motion to Reopen the Record to enter the arbitration award. (JA 728-730; ADD 38-40).

Not only should the arbitration award have been allowed into the record, it ought rightfully to govern this matter. The General Counsel failed, however, to properly defer to the arbitration process, pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971). Had the General Counsel properly granted SPPRC's demand

for deferral at the outset of this matter, the General Counsel would have borne the burden of proving this award, addressing a parallel issue and issued by an arbitrator presented with the same facts relevant to the unfair labor practice issue, was not "susceptible to an interpretation consistent with the Act. *See Kvaerner Philadelphia Shipyard*, 346 NLRB 390 (2006); *Olin Corp.*, 268 NLRB 573 (1984). Instead, the Board's ruling has allowed the General Counsel to unjustly benefit from its earlier error. It must be reversed.

The arbitration award constitutes "evidence which has become available only since the close of the hearing" that the Board was empowered to reopen the record to receive. This evidence was not introduced or addressed earlier solely because it was not available until March 18, 2018. Had it been available, the ALJ would likely have allowed the award into evidence because doing so would have followed his decision to accept into evidence the preliminary letter issued by the discrimination division of MNOSHA

In support of his decision to allow the preliminary MNOSHA letter into the record, the ALJ noted that it would inform his assessment of the safety issues at hand. The arbitration award, however, would have better informed an assessment of the safety and contractual issues at hand, a broader assessment of the events of November 4, and the Company's motivations for discipline. It would do so more reliably than the preliminary MNOSHA letter, because, whereas MNOSHA issued

its preliminary letter without permitting the Company to submit evidence, , the arbitration award was only issued after Topor's union and SPPRC each had a full and fair opportunity to present their case, and cross-examine all adverse witnesses, before a neutral arbitrator. Finally, the award's relevance is sufficiently apparent that any decision not to receive the award would have been grounds for an appeal.

The record already includes a preliminary document issued by a non-Board agency, and the Board should not have been allowed to choose for consideration a preliminary decision from a non-contested hearing over the arbitrator's award.

CONCLUSION

The Board erred by concluding that SPPRC violated Section 8(a)(1) by issuing Topor a final written warning and ten day suspension and by denying SPPRC's motions to reopen the record. The Board failed to properly review the order issued by the ALJ, and its decision is unsupported by substantial evidence and goes beyond what good sense permits. The Board's decision must be reversed and its cross-application for enforcement denied.

Dated: September 11, 2018

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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,987 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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Dated: September 11, 2018

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CERTIFICATE OF SERVICE FOR DOCUMENTS FILED USING CM/ECF

I certify that on September 11, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

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